

Gregory S. Gilbert, Nevada Bar No. 6310  
Sean D. Thueson, Nevada Bar No. 8690  
HOLLAND & HART LLP  
3800 Howard Hughes Pkwy., 10<sup>th</sup> Floor  
Las Vegas, Nevada 89169  
Telephone: 702-669-4600  
Facsimile: 702-669-4650

-and-

Thomas R. Buchanan  
*Admitted Pro Hac Vice*  
McDOWELL, RICE, SMITH & BUCHANAN  
605 West 47<sup>th</sup>, Suite 350  
Kansas City, MO 64112  
Telephone: 816-753-5400  
Facsimile: 816-753-9996

10 *Attorneys for Defendants*  
11 *Terracon Consultants Western, Inc.,*  
*and Terracon, Inc.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEVADA

MANDALAY RESORT GROUP, fka  
CIRCUS CIRCUS ENTERPRISES, INC. a  
Nevada corporation; MANDALAY  
DEVELOPMENT, fka CIRCUS CIRCUS  
DEVELOPMENT CORP., a Nevada  
corporation; and MANDALAY CORP., a  
Nevada corporation.

**Plaintiff.**

V.  
1

TERRACON CONSULTANTS WESTERN,  
INC., an Iowa corporation; TERRACON,  
INC., an Iowa corporation; and DOES 1  
through 50, inclusive.

**Defendant.**

CASE NO. 2:04-cv-1488-RCJ-PAL

**RENEWED MOTION FOR SUMMARY  
JUDGMENT AND SUPPLEMENTAL  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

DATE: N/A  
TIME: N/A

## AND ALL RELATED ACTIONS

26 Defendants Terracon Consultants Western, Inc. and Terracon, Inc., (hereinafter "Terracon"),  
27 by and through undersigned counsel, hereby renews its Motion for Summary Judgment (Doc. # 32)  
28 and its Motion for Partial Summary Judgment on the Economic Loss Doctrine and the Limitation of

1 Liability Clause (Doc. #33), and moves the Court to enter summary judgment against Plaintiff  
 2 Mandalay Resort Group, fka Circus Circus Enterprises, Inc., Mandalay Development fka Circus  
 3 Circus Development Corp. and Mandalay Corp. (collectively "Plaintiff") based on the doctrine of  
 4 judicial estoppel and/or to enter summary judgment against Plaintiff on its tort claims based on the  
 5 Nevada Supreme Court's interpretation of the economic loss doctrine and to enter judgment as a  
 6 matter of law that Terracon's liability to Plaintiff in this case is limited to \$50,000.00.

7 These Renewed Motions are based upon the Memorandum of Points and Authorities  
 8 submitted with Terracon's Motion for Summary Judgment (Doc. #32), the Memorandum of Points  
 9 and Authorities submitted with Terracon's Motion for Partial Summary Judgment (Doc. #33), and  
 10 the Reply Memorandum of Points and Authorities to that Motion (Doc. #56), and all supporting  
 11 documentation, the pleadings and papers on file herein, and any oral argument this Court may  
 12 allow.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **Summary of Proceedings And Status of Motions**

15 1. On April 20, 2005, Terracon filed its Motion for Summary Judgment on the basis of  
 16 Judicial Estoppel (Doc. #32) ("Judicial Estoppel Motion"). Terracon sought judgment against  
 17 Plaintiff based on inconsistent positions taken by Plaintiff under oath in prior court proceedings  
 18 against Plaintiff's insurance carrier, during which Plaintiff's representatives and experts testified  
 19 Terracon's work at the project was not defective or deficient. Based upon those sworn statements,  
 20 Plaintiff was able to successfully obtain millions of dollars in payment from its insurance company.  
 21 Accordingly, Terracon requested the Court apply the doctrine of judicial estoppel to bar Plaintiff  
 22 from taking the exact opposite position in this lawsuit against Terracon. (*Id.*)

23 2. On April 21, 2005, Terracon filed its Motion for Partial Summary Judgment on the  
 24 Economic Loss Doctrine and the Limitation of Liability Clause (Doc #33) ("Terracon's Motion for  
 25 Partial Summary Judgment"). Terracon sought summary judgment on the following claims or  
 26 issues:

27 a. Terracon sought summary judgment on Plaintiff's tort claims based upon the  
 28 application of the economic loss doctrine. (Doc. #33).

1           b. Terracon sought summary judgment that the limitation of liability provision  
 2 contained within Terracon's contract was valid and enforceable and limited  
 3 Terracon's liability to Plaintiff on this project to \$50,000.00. (Doc. #33).

4           3. On June 13, 2005, the Court heard oral arguments on Terracon's Motion for Partial  
 5 Summary Judgment. (Doc. #57).

6           4. On February 21, 2006, the Court entered an Order denying, without prejudice,  
 7 Terracon's Motion for Partial Summary Judgment pending resolution of the issue of certification of  
 8 questions to the Nevada Supreme Court. (Doc. #88).

9           5. On March 22, 2006, the Court clarified its Minutes of Court from the June 13, 2005,  
 10 hearing to state that the Court made no ruling as to Terracon's Judicial Estoppel Motion and that the  
 11 Court took that issue under submission. (Doc. # 95). No ruling has been made on Terracon's  
 12 Judicial Estoppel Motion. For the reasons set forth in the Judicial Estoppel Motion and relating  
 13 Memorandum of Points and Authorities, Terracon respectfully requests this Court enter summary  
 14 judgment against Plaintiff on all claims based on the doctrine of judicial estoppel.

15           6. On March 30, 2009, the Nevada Supreme Court answered the question certified by  
 16 this Court, finding the economic loss doctrine applies to bar tort claims against design professionals  
 17 in the commercial construction context. Accordingly, Terracon's Motion for Partial Summary  
 18 Judgment, as it pertains to the bar of tort claims based upon the economic loss doctrine, should now  
 19 be granted.

20           7. Terracon also renews its Motion for Partial Summary Judgment as to the  
 21 enforceability of the limitation of liability provision within Terracon's contract. Terracon reasserts  
 22 the facts, evidence, and arguments contained in its Motion for Partial Summary Judgment and  
 23 related Memorandum of Points and Authorities as though fully set forth here. For the reasons set  
 24 forth in the Motion for partial Summary Judgment, as well as those set forth below, Terracon  
 25 respectfully requests this Court enter summary judgment that Terracon's total liability to Plaintiff  
 26 for work performed on this project is limited to \$50,000.00.

27           ///

28           ///

1                   **SUPPLEMENTAL ARGUMENTS AND AUTHORITIES**  
 2                   **ON ENFORCEABILITY OF TERRACON'S**  
 3                   **LIMITATION OF LIABILITY CLAUSE**

4                   Because the Nevada Supreme Court has now definitively answered that Plaintiff cannot  
 5 recover economic losses in tort arising from the project, Plaintiff must rely upon its contractual  
 6 remedies as set forth in the agreements between the parties. Nevada law enforces bargained-for  
 7 limitation of liability provisions contained in arms' length contracts, particular where, as here, the  
 8 contracting parties are sophisticated commercial entities. *See Bernstein v. GTE Directories*, 631 F.  
 9 Supp. 1551, 1553 (D. Nev. 1986). Therefore, if Plaintiff entered into a contract with Terracon that  
 10 contains a limitation of liability provision, such provision should be enforced as a matter of law. It  
 11 is uncontested that Plaintiff entered into a contract with Terracon on this project that contains a  
 12 valid and enforceable limitation of liability provision. Terracon presented substantial evidence  
 13 supporting these facts in its Motion for Partial Summary Judgment, which Plaintiff wholly failed to  
 14 controvert.

15                  Plaintiff made a binding judicial admission in its Complaint that the parties reached a  
 16 written contract for Terracon's services at the project based upon Terracon's March 4, 1996  
 17 Proposal. (Complaint, ¶16; Answer, ¶16). Terracon's March 4, 1996 Proposal, and the subsequent  
 18 proposals modifying price, contained Terracon's standard Terms and Conditions, which included a  
 19 limitation of liability provision limiting Terracon's liability in connection with its services on the  
 20 project to \$50,000.00. (*See Exhibit 1 to Motion*). Although Plaintiff did not sign Terracon's March  
 21 4, 1996 proposal, Plaintiff subsequently directed Terracon to proceed to perform its services on  
 22 the project in accordance with this contract. (*Id.*) As such, Plaintiff accepted the terms of  
 23 Terracon's March 4, 1996 proposal by its performance. It is uncontested that Terracon  
 24 performed all of the services described in its written proposals at the locations and to the depths  
 25 described in those written proposals. It is uncontested that Terracon billed Plaintiff pursuant to  
 26 the written proposals and that Plaintiff paid Terracon in accordance with Terracon's written  
 27 proposals. The parties' course of dealing and full performance of Terracon's March 4, 1996 and  
 28 March 22, 1996 proposals demonstrates there was a valid, enforceable agreement between the  
 parties. *See J.A. Jones Construction Co. v. Plumbers and Pipefitters Local 598*, 568 F.2d 1292,

1 1294-95 (9th Cir. 1978) (holding valid written contract signed by only one party, but fully  
 2 recognized and acted upon by both, is binding).

3 Plaintiff cannot avoid the contract or its restrictions simply by claiming Plaintiff did not sign  
 4 the contract. Pursuant to N.R.S. 78.135, “any contract . . . otherwise lawful, made in the name of a  
 5 corporation, which is authorized or ratified by the directors, or is done within the scope of the  
 6 authority, actual or apparent, given by the directors, binds the corporation . . . whether the contract  
 7 is signed or is wholly or in part executory.” *See also Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 963 P.2d  
 8 488 (1998) (holding corporation bound by contract ratified by directors). Therefore, when  
 9 Plaintiff’s representatives, with either actual or apparent authority, instructed Terracon to perform  
 10 the work identified in the March 4, 1996 and March 22, 1996 proposals, Plaintiff authorized or  
 11 ratified Terracon’s contract—including the limitation of liability provision—and Plaintiff is bound  
 12 by that contract even though it is unsigned. This is wholly consistent with the prior relationships  
 13 and contracts between these parties. Plaintiff admits it had, before this project, entered into another  
 14 contract with Terracon, which contained a similar limitation of liability provision. Consistent with  
 15 its actions on this project, Plaintiff admits it did not sign the prior contract with Terracon, but  
 16 accepted the contract by authorizing Terracon to perform the work identified in the written  
 17 proposal. (See Opposition, Doc. # 46, p. 17 and Exhibit 9 thereto).

18 For all of these reasons, as well as those set forth in Terracon’s Motion for Partial Summary  
 19 Judgment (Doc. #33) and Reply Memorandum (Doc. #56), Terracon is entitled to judgment as a  
 20 matter of law that its liability to Plaintiff for any work performed on this project is limited to  
 21 \$50,000.00.

22     ///

23     ///

24     ///

25     ///

26     ///

27     ///

28     ///

**HOLLAND & HART LLP**  
 3800 Howard Hughes Parkway, 10th Floor  
 Las Vegas, NV 89169  
 Phone: (702) 669-4600 • Fax: (702) 669-4650

## CONCLUSION

For these reasons, Terracon respectfully request this Court enter summary judgment for Terracon on all of Plaintiff's claims pursuant to Terracon's Motion for Summary judgment (Doc. #32), or enter summary judgment on all of Plaintiff's tort based claims based on the economic loss doctrine pursuant to Terracon's Motion for Partial Summary Judgment (Doc. #33), and enter summary judgment finding Terracon's total liability to Plaintiff for any work performed by Terracon on this project is limited to \$50,000.00, and for such other and further relief as this Court deems just and proper.

DATED this 16<sup>th</sup> day of April 2009.

HOLLAND & HART LLP and McDOWELL, RICE,  
SMITH & BUCHANAN

By

Gregory S. Gilbert, Nevada Bar No. 6310  
Sean D. Thueson, Nevada Nar No. 8690  
3800 Howard Hughes Pkwy., 10<sup>th</sup> Floor  
Las Vegas, Nevada 89169  
Telephone: 702-669-4600  
Facsimile: 702-669-4650

-and-

Thomas R. Buchanan  
*Admitted Pro Hac Vice*  
605 West 47<sup>th</sup>, Suite 350  
Kansas City, MO 64112  
Telephone: 816-753-5400  
Facsimile: 816-753-9996  
Attorneys for Defendants  
Terracon Consultants Western, Inc.;  
and Terracon, Inc.

## **CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing **RENEWED MOTION FOR SUMMARY JUDGMENT AND SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** was made this 16<sup>th</sup> day of April 2009, by depositing a true copy of the same for mailing at Las Vegas, Nevada, addressed to each of the following:

Jean A Weil, Esq.  
John T. Wendland, Esq.  
WEIL & DRAGE, APC  
2500 West Sahara Avenue; Suite 106  
Las Vegas, NV 89102  
702-314-1909 Fax  
*Attorneys for Third-Party Defendants*  
*Lochsa, LLC and Klai-Juba Architects, Ltd.*

Dennis R. Haney, Esq.  
Stefanie R. Shields, Esq.  
HANEY, WOLOSON & MULLINS  
1117 South Rancho Drive  
Las Vegas, NV 89102  
702-474-7009 Fax  
*Attorneys for Plaintiff*  
*Mandalay Report Group f/k/a*  
Circus Circus Enterprises, Inc.

David R. Lira, Esq.  
Shahram Shayesteh, Esq.  
GIRARDI & KEESE  
1126 Wilshire Blvd.  
Los Angeles, CA 90017  
213-481-1554 Fax  
*Attorneys for Plaintiff*  
*Mandalay Report Group f/k/a*  
*Circus Circus Enterprises, Inc.*

Afshin Tadayon, Esq.  
BENNION CLAYSON MARIAS & HAIRE  
1140 North Town Center Drive  
Suite 200  
Las Vegas, NV 89144  
702-233-9665 Fax  
*Attorneys for Third-Party Defendant  
The Pressure Grout Company*

Soren F. Releser  
An employee of Holland & Hart LLP

4496672 1